

1 HONORABLE THOMAS S. ZILLY
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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 AMERICAN MANAGEMENT SERVICES)
11 EAST, LLC, a Washington limited liability)
company, AMERICAN MANAGEMENT)
SERVICES LLC, a Washington limited liability)
company, AMERICAN MANAGEMENT)
SERVICES CALIFORNIA INC., a Washington)
corporation, GOODMAN REAL ESTATE, INC.,)
a Washington corporation, formerly d/b/a)
GOODMAN FINANCIAL SERVICES, INC.,)
STANLEY HARRELSON, an individual, JOHN)
GOODMAN, an individual, PINNACLE IRWIN)
LLC, a Washington limited liability company,)
PINNACLE MONTEREY LLC, a Washington)
limited liability company,)
Plaintiffs,)
v.)
SCOTTSDALE INSURANCE COMPANY, a)
Delaware corporation, and LEXINGTON)
INSURANCE COMPANY, a Delaware)
corporation,)
Defendants.)

23 I. INTRODUCTION

24 Plaintiffs—American Management Services LLC and its affiliates (collectively “AMS”)
25 —ask this Court to impose on Scottsdale Insurance Company (“Scottsdale”) a duty to fund
26 AMS’s litigation costs in a commercial dispute arising from fraud and other intentional

1 misconduct. Scottsdale insured AMS against liability claims for bodily injury and property
 2 damage caused by accidental occurrences. Scottsdale did not agree to underwrite AMS's
 3 business quarrels or to immunize it against the consequences of claimed corrupt business
 4 practices.¹ The Court should deny AMS's motion and grant Scottsdale's motion for summary
 5 judgment.

6 II. ARGUMENT²

7 The material facts are stated in detail in the parties' cross motions and are undisputed.

8 See Dkt. Nos. 53, 57, 59. The case thus turns on a legal question: whether the allegations in the
 9 underlying complaints—*Monterey Bay Military Housing LLC ("MBMH") et al. v. Pinnacle*
 10 *Monterey LLC et al.* in California, and *Fort Benning Family Communities LLC ("FBFC") and*
 11 *Fort Belvoir Residential Communities LLC ("FBRC") v. American Management Services East*
 12 *LLC et al.* in Georgia—sought potential covered liability. They did not.

13 A. AMS attempts to rely on irrelevant documents.

14 As an initial matter, Scottsdale objects to consideration of certain materials cited in
 15 AMS's motion. In particular, the Fifth Amended Complaint in the MBMH action ("MBMH 5th
 16 AC") was never tendered to Scottsdale. Moreover, several documents that AMS considers
 17 "extrinsic evidence" were never previously called to Scottsdale's attention.

18 1. The MBMH 5th AC was not tendered.

19 AMS mistakenly claims that the MBMH 5th AC was tendered to Scottsdale. See Dkt.
 20 No. 59 at 21. For this proposition, it cites a letter dated April 15, 2015. See *id.* (citing Dkt. No.
 21 52-10). This letter challenges Scottsdale's denial based on the MBMH *Fourth* Amended
 22

23 ¹ AMS was found in the Fort Benning action to have committed intentional misconduct as a matter of law. See
 24 *American Management Services East, LLC v. Fort Benning Family Communities, LLC*, 333 Ga. App. 664, 774 S.E.
 2d 233 (2015). And it admitted the basis for the related claims in the MBMH action. Dkt. No. 54 at 13.

25 ² At 8:59 a.m. on December 11, 2015 AMS filed Plaintiffs' Praeclipe making seven corrections to its Motion for
 26 Summary Judgment. Scottsdale has made an effort to consider the corrections, the impact they have on its
 Opposition and to make changes to its Opposition as needed in order to file this Opposition on December 11, 2015.
 Nevertheless, Scottsdale reserves the right to make additional changes if they are deemed necessary in the future.

¹ Complaint. Dkt. No. 52-10, *passim*. It mentions in footnotes that MBMH had recently obtained
² leave to file its 5th AC. *Id.* at 3, 13. This filing did not occur until the next day. Dkt. No. 51-11.

3 The MBMH 5th AC was never tendered to Scottsdale. Greer decl.³ at ¶¶ 3–4. And yet,
4 AMS expressly limits its motion to the claim that the Fifth Amended Complaint in each action
5 triggered a duty to defend. Dkt. No. 59 at 4 n. 1. Because AMS offers no authority for the
6 notion that an insurer can be required to defend against a complaint that was never tendered to it,
7 AMS’s motion must be denied as to the MBMH action on this ground alone.⁴

2. The Court should disregard materials that were not called to Scottsdale's attention before the filing of this lawsuit.

AMS asks this Court to find a duty to defend based on materials that were not known to Scottsdale when it made its coverage determination. An insurer can consider extrinsic information only if: ““(a) the allegations are in conflict with facts known to or readily ascertainable by the insurer or (b) the allegations of the complaint are ambiguous or inadequate.”” *Atl. Mut. Ins. Co. v. Roffe, Inc.*, 73 Wn. App. 858, 862, 872 P.2d 536 (1994) (quoting *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 908, 726 P.2d 439 (1986)). Although the declarations that AMS called to Scottsdale’s attention became “facts known to or readily ascertainable by” Scottsdale, the following items did not:

1. The declarations attached to the Matthews declaration. Dkt. Nos. 66-1, 66-2. The attorney submitting these exhibits does not claim that they were ever previously called to Scottsdale's attention. Dkt. No. 60. Also, AMS fails to identify at what date Exhibits 17–25 were publicly available. *See* Dkt. No. 66-1.
2. AMS's motion in limine in the MBMH action and the response in opposition. Dkt. No. 65. These pleadings were not filed until after AMS filed this lawsuit.

³ The Greer Declaration in opposition to AMS's motion is filed together with this response.

⁴ In any event, none of the new allegations in the MBMH 5th AC raised any covered claims. It essentially provided new details regarding the underlying plaintiffs' racketeering allegations and claimed fraudulent transfer as a RICO predicate. See Dkt. No. 51-11 at 41–46. It also alleged that AMS employees were instructed to destroy or steal documents, that the Army supported the removal of AMS as property manager, and that AMS senior management knew about AMS's fraudulent work-order scheme. *Id.* at 12, 22.

1 3. The April 2014 Government Accountability Office (“GAO”) report. Dkt. No.
 2 67-2. Again, the attorney submitting this exhibit does not claim that it was ever
 3 called to Scottsdale’s attention before the present motion. *See* Dkt. No. 67.

4 Scottsdale therefore objects to consideration of these materials because they are
 5 irrelevant. In any event, as explained below, these materials do not support AMS’s position.
 6 Rather, they merely confirm that the underlying plaintiffs alleged fraud and other intentional
 7 misconduct that was not covered under the Scottsdale policies.

8 **B. AMS misstates the legal standard for triggering the duty to defend.**

9 Another inherent flaw in AMS’s motion is its faulty understanding of what must be
 10 alleged in a complaint in order to trigger an insurer’s duty to defend. The burden is on the
 11 insured to show that the underlying complaint “alleges facts which could, if proven, impose
 12 liability upon the insured within the policy’s coverage.” *Expedia, Inc. v. Steadfast Ins. Co.*, 180
 13 Wn.2d 793, 802–03, 329 P.3d 59 (2014) (quoting *Am. Best Food, Inc. v. Alea London, Ltd.*, 168
 14 Wn.2d 398, 404, 229 P.3d 693 (2010)). The duty to defend, while broad, does not arise merely
 15 because the underlying plaintiffs *could have* raised covered allegations.

16 **The duty to defend is not triggered by the possibility of additional allegations.** AMS
 17 argues that the duty to defend can arise “regardless of the specific relief sought or the claims
 18 asserted.” Dkt. No. 59 at 10 (citing *Expedia*, 180 Wn.2d at 802). But *Expedia* does not support
 19 this proposition. There, Expedia was sued for collecting the wrong amount of local occupancy
 20 taxes from its hotel customers. *Expedia*, 180 Wn.2d at 797–98. Its insurance policy broadly
 21 covered any liability for damages “arising out of a negligent act or negligent omission . . . in the
 22 conduct of Travel Agency Operations.” *Id.* at 798 (alteration in original). Because it was
 23 conceivable that Expedia “could be found to be liable under the underlying complaints, yet not
 24 have engaged in willful misconduct,” the claim was conceivably covered. *Id.* at 805.

25 Here, in contrast, the underlying plaintiffs claim that AMS’s fraudulent practice of
 26 falsifying work orders created life-safety hazards. *Expedia* does not help AMS because the

1 underlying plaintiffs specifically alleged willful misconduct. Further, nothing in *Expedia* can be
 2 read to support AMS's misguided assumption that a duty to defend can arise simply because the
 3 underlying plaintiffs *could have* raised a claim for property damage.

4 No Washington case holds that an insurer must speculate as to un-pleaded facts, and such
 5 a rule has been overwhelmingly rejected by courts around the nation. *See ALLAN D. WINDT, 1*
6 INSURANCE CLAIMS AND DISPUTES § 4:1 (6th ed.) (citing more than fifty cases, at fn 37–42, for
 7 the rule that an insurer is not required to speculate about whether a covered claim is being made
 8 and that the fact the complaint could be amended to assert a covered claim is irrelevant); *see also*
9 Connecticut Indem. Co. v. DER Travel Service, Inc., 328 F.3d 347, 350–51 (7th Cir. 2003) (“it is
 10 the actual complaint, not some hypothetical version, that must be considered”). If Washington
 11 law is silent on an issue, and “the persuasive authority supports the insurer’s denial of the duty to
 12 defend,” then there is no legal uncertainty or ambiguity that would require construction in favor
 13 of the insured. *Grange Ins. Ass’n v. Roberts*, 179 Wn. App. 739, 764, 320 P.3d 77 (2013) *review*
14 denied, 180 Wn.2d 1026, 328 P.3d 903 (2014) (citing *Alea*, 168 Wn.2d at 404). Given the lack
 15 of Washington support for AMS’s position, the nationwide rejection of AMS’s proposed rule
 16 militates against a duty to defend. *See id.* (no duty to defend where the overwhelming majority
 17 of jurisdictions would not consider the claim to involve covered acts).

18 **The substance of the underlying litigation is a claim for fraud and other uncovered**
19 intentional misconduct. AMS also cites *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869,
 20 784 P.2d 507 (1990). AMS relies on an out-of-context statement that “coverage ‘does not hinge
 21 on the form of action taken or the nature of the relief sought [. . .].’” Dkt. No. 59 at 10 n. 45
 22 (quoting *Boeing*, 113 Wn.2d at 878). This case likewise does not help AMS.

23 *Boeing* arose from an environmental-cleanup action. The certified question was whether
 24 “the environmental response costs paid or to be paid by the insureds . . . constitute ‘damages’
 25 within the meaning of the [policies].” *Boeing*, 113 Wn.2d at 873. The insurers contended that
 26 “damages” should be given a “legal technical meaning” and that the court should distinguish

1 “between law remedies, excluding restitution-type law damages.” *Id.* at 876. The court
 2 disagreed, explaining that “coverage does not hinge on the form of action taken or the nature of
 3 relief sought, but on an actual or threatened use of legal process to coerce payment or conduct by
 4 a policyholder.” *Id.* at 878 (quoting *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 662 F. Supp.
 5 71, 75 (E.D. Mich.1987)). The court focused on the “substance of the damage claim.” *Id.* at
 6 884. Because “the substance of the claim for response costs” concerned “compensation for
 7 restoration of contaminated water and real property,” it was a claim for “property damage”
 8 within the policy’s scope. *Id.* at 884–85.

9 Here, in contrast, the “substance of the claim” in the underlying complaints is that AMS
 10 committed fraud and other intentionally wrongful practices. Curiously, AMS asserts that the
 11 “only expressed motivation for filing the Underlying Lawsuits was to ‘address concerns for
 12 resident safety.’” Dkt. No. 59 at 3. This contention is directly contradicted by the underlying
 13 complaints. *See* Dkt. No. 51-1 at 2 (Fort Benning action brought “to seek declaratory judgments
 14 that the Property Management Agreements . . . are terminated for cause”); Dkt. No. 51-6 at 2
 15 (MBMH “complaint seeks declaratory and injunctive relief to prevent Defendants from . . .
 16 taking steps to unilaterally amend two property management agreements to effectively immunize
 17 Defendants from liability for their own fraud”).

18 AMS cites the GAO report regarding litigation costs. Dkt. No. 59 at 3. But at the cited
 19 page, the report explains that “Clark asked the Army for permission to remove Pinnacle as
 20 property manager at Fort Benning and Fort Belvoir because of alleged willful misconduct by
 21 Pinnacle employees . . .” Dkt. No. 67-2 at 8.⁵ It then describes AMS’s attempt “to unilaterally
 22 amend the terms” of the property management agreements and states that the MBMH plaintiffs
 23 brought suit “seeking a declaratory judgment that the agreements had not been effectively
 24 amended by Pinnacle.”⁶ *Id.* The Army wanted AMS removed “due to the alleged fraud and

25 ⁵ As explained above, this document is irrelevant because it was not previously called to Scottsdale’s attention.

26 ⁶ AMS is referred to interchangeably as both “AMS” and “Pinnacle” in the underlying litigation.

1 mismanagement.” *Id.* Only after explaining this dispute, does the report say that “additionally”
 2 Army officials were “motivated by concerns for resident safety.” *Id.* In short, the substance of
 3 the underlying litigation was a commercial dispute, based on intentional misconduct, for which
 4 insurance coverage would violate this state’s public policy. *See Am. Home Assur. Co. v. Cohen*,
 5 124 Wn.2d 865, 871, 881 P.2d 1001 (1994).

6 C. **AMS fails to show that the underlying complaints sought liability for**
property damage or bodily injury.

7 The Scottsdale policies provided coverage only for “those sums that the insured becomes
 8 legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which
 9 this insurance applies.” Dkt. Nos. 50-6 at 21, 50-8 at 22, 50-9 at 21, 50-10 at 24. The duty to
 10 defend accrued only with respect to suits “seeking those damages.” *Id.* AMS cannot show that
 11 the underlying cases were suits seeking damages for property damage or bodily injury.

12 1. **Creation of a risk is not property damage or bodily injury.**

13 AMS attempts to shoehorn the underlying litigation into this coverage by referring to the
 14 allegation that work-order fraud led to “critical life and safety” hazards. Dkt. No. 59 at 7. AMS
 15 contends that courts “in other jurisdictions hold that allegations of exposure to health and safety
 16 risks can be sufficient to allege the possibility of covered ‘bodily injury.’” *Id.* at 16 (citing *U.S.*
Fid. & Guar. Co. v. Korman Corp., 693 F. Supp. 253, 259 (E.D. Pa. 1988)). Despite claiming
 17 that “other jurisdictions” so hold, AMS relies entirely on a single case from Pennsylvania.
 18

19 In *Korman*, the language about “health and safety risks” was dicta. *See Korman*, 693 F.
 20 Supp. at 259. The court mentioned that the Pennsylvania Superior Court had “determined in
 21 *dictum*” that similar allegations of exposure to health and safety risks alleged “bodily injury.”
 22 *Id.* (citing *Techalloy Co. v. Reliance Insurance Co.*, 338 Pa.Super. 1, 487 A.2d 820 (1984)). The
 23 court declined to decide the issue, however, because any arguable bodily injury or property
 24 damage would be excluded on other grounds. *Id.* at 259. It is telling that, for its linchpin legal
 25 proposition, AMS relies on dicta from a 27-year-old Pennsylvania case that relied, in turn, on
 26

1 dicta from a Superior Court case. Moreover, unlike the underlying plaintiffs here, the *Korman*
 2 plaintiffs specifically alleged not only that the defendants created risks but also that these risks
 3 caused damage. *See id.* (noting that the plaintiffs sought “damages for their properties’ loss in
 4 value,” as well as “damages ‘for costs of medical monitoring made necessary by their exposure
 5 to the health and safety risks concealed by defendants’ and for emotional distress”).

6 Indeed, AMS’s argument—that allegations of created risk trigger insurance coverage—
 7 conflicts with Washington law. *See Wellbrock v. Assurance Co. of Am.*, 90 Wn. App. 234,
 8 242-43, 951 P.2d 367 (1998). In *Wellbrock*, a developer negligently damaged trees on property
 9 adjacent to the plaintiffs’ residence. The following year, one of the trees fell onto the plaintiffs.
 10 *Id.* at 237. The developer’s insurance policy expired between the time the trees were damaged
 11 and the day the injurious tree fell. *Id.* at 243.

12 The court explained that coverage is not triggered until an actual injury occurs:

13 We therefore hold that the coverage triggering “occurrence” refers
 14 to *the event causing injury to the complaining party, not the*
earlier event that created potential for future injury. An
 15 “occurrence” refers to *“the fruits of a negligent act, not to the*
sowing of the seeds” because it is the consequence that signifies
 16 coverage, and not the cause. *Stillwell v. Brock Bros., Inc.*, 736
 17 F.Supp. 201, 206 (1990). *The mere presence of a “hazard,”*
 defined as a “source from which an accident may arise,” 11 Couch,
 § 44:286, *does not trigger coverage*. *Stillwell*, 736 F.Supp. at 206.

18 *Wellbrock*, 90 Wn. App. at 242–43 (emphasis added). Because the creation of a hazard failed to
 19 trigger coverage, the insurer had no duty to defend. *Id.* at 244. The same is true here.

20 2. The underlying plaintiffs lacked standing to claim bodily injury.

21 In any event, there can be no rational contention that the underlying plaintiffs sought
 22 damages for bodily injury. Under the policies, “bodily injury” is “bodily injury, sickness or
 23 disease sustained by a person, including death resulting from any of these at any time.” Dkt.
 24 Nos. 50-6 at 33, 50-8 at 34, 50-9 at 81, 50-10 at 88. The underlying plaintiffs were limited
 25 liability companies, incapable of sustaining such injury. *See* Dkt. Nos. 51-5 at 1, 51-10 at 1.

1 AMS attempts to distract from this most obvious of points by claiming that its conduct
 2 may have harmed other people. *See, e.g.*, Dkt. No. 59 at 8. In particular, AMS relies on Paul
 3 Cramer's declaration, in which he described two incidents, one in which a family was exposed to
 4 carbon-monoxide fumes and another in which a fire caused a fatality. *Id.* at 9. AMS also
 5 mentions two cases filed against AMS in Monterey County Superior Court in California,
 6 designated as the *Mosquera* and *Charbonneau* cases. *Id.* at 11.

7 But neither the *Charbonneau* and *Mosquera* plaintiffs nor the two individuals mentioned
 8 by Cramer were parties to the underlying litigation, and the underlying plaintiffs did not have
 9 standing to sue for these other individuals' injuries. The MBMH complaint does *not* allege, for
 10 example, that Clark Pinnacle Monterey Bay LLC ("CPMB")⁷ incurred liability to the Mosqueras
 11 or the Charboneaus and sought contribution from AMS. Nor do the underlying complaints
 12 allege that the underlying plaintiffs took assignment of any individuals' claims.

13 Absent such an allegation, a California or Georgia court could not have found AMS
 14 liable to the underlying plaintiffs for bodily injury sustained by non-parties. *See Feminist*
 15 *Women's Health Ctr. v. Burgess*, 282 Ga. 433, 434-35, 651 S.E.2d 36 (2007) (to establish
 16 standing, a litigant must have suffered an "injury in fact") (citing *Powers v. Ohio*, 499 U.S. 400,
 17 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)); *Emerald Bay Cnty. Ass'n v. Golden Eagle Ins.*
 18 *Corp.*, 130 Cal.App.4th 1078, 1091-92, 31 Cal.Rptr.3d 43 (2005) (trial court correctly dismissed
 19 uninjured party's lawsuit based on lack of standing where complaint did not allege assignment or
 20 claim contribution). As such, AMS faced no potential liability for bodily injury.

21 3. AMS fails to show any potential liability for property damage.

22 Nor did the underlying complaints seek liability for property damage. "Property
 23 damage" means: (a) "Physical injury to tangible property, including all resulting loss of use of
 24 that property"; or (b) "Loss of use of tangible property that is not physically injured." Dkt. Nos.
 25

26 ⁷ CPMB is the only underlying plaintiff that was also a defendant in either the *Mosquera* or the *Charbonneau* case.
 See Dkt. No. 66 at 1, 41-42. No plaintiff in the Fort Benning action was sued in either of these cases.

1 50-6 at 35, 50-8 at 36, 50-9 at 35, 50-10 at 38. There are no allegations in the underlying
 2 complaints that would meet either definition.⁸ AMS acknowledges that there is “no need to
 3 resort to extrinsic evidence.” *Id.* at 16. But it then dedicates most of its brief to extrinsic
 4 evidence, including declarations and other pleadings from the underlying litigation, all of which
 5 fail to show potential liability for property damage.

6 **The employee declarations failed to allege any instances of property damage.** AMS
 7 argues that the underlying complaints’ references to “‘life and safety’ issues” were “a proxy for
 8 property damage and bodily injury.” Dkt. No. 59 at 5. AMS then claims that ex-employee
 9 declarations “unambiguously recount multiple alleged instances of property damage.” *Id.* (citing
 10 Dkt. Nos. 52-4 at 30–36; 52-5; 52-6; 52-7 at 1–2; Mathews decl., Exs. 17-26). The cited
 11 documents, however, reveal that the underlying plaintiffs—far from using “risks” as a “proxy”
 12 for anything—meant exactly what they said in their detailed, 62-page complaint. Rather than
 13 recounting “instances of property damage,” these documents support only the notion that AMS’s
 14 misconduct may have created unspecified “risks.”

15 AMS cites, for example, ex-employee declarations at Dkt. Nos. 52-5–52-7. These offer a
 16 few references to pre-existing damage, with no suggestion that AMS caused it. *See* Dkt. No.
 17 52-6 at 4 (“there was a spreadsheet kept of open work orders related to cracked countertops and
 18 flooded basements”); *id.* at 31 (employee instructed “to close out some work orders relating to
 19 cracked countertops and to melted siding, even though the work had not been completed”).

20 Other declarations speculated that failure to make repairs ***might*** cause conditions to
 21 worsen in the future, with no allegation that this actually occurred. *See id.* at 13 (“I was
 22 concerned for residents that if we had not inspected and repaired the damage, they could later

23
 24 ⁸ AMS might argue that one allegation in the Fort Benning action, that AMS stole scrap metal, could meet definition
 25 (b). Although Washington law is silent on this issue, other jurisdictions have rejected the notion that conversion
 26 meets this definition of property damage, because conversion damages are loss of the property itself, not loss of its
 use. *See, e.g., Collin v. Am. Empire Ins. Co.*, 21 Cal.App.4th 787, 817–19, 26 Cal.Rptr.2d 391 (1994). It is not
 necessary for the Court to resolve this issue here, however, because theft is not an accidental occurrence and is
 subject to various exclusions, as discussed below.

1 have mold issues."); *id.* at 29 ("... I knew that there would be no record in the system showing
 2 that the maintenance work had not been done, even if that work was critical to the safety of the
 3 home and its residents."); Dkt. No. 52-7 at 2 (employee was told to paint over mold and "knew
 4 this was wrong because it meant that mold wasn't being removed properly").

5 AMS also cites several exhibits to the Mathews declaration. These are additional
 6 declarations which, as explained above, were not previously submitted to Scottsdale and
 7 therefore are irrelevant. *See* Dkt. Nos. 66-1, 66-2. They also fail to allege any instances of
 8 property damage. They focus instead on allegations that AMS employees accepted bribes and
 9 kickbacks. *See, e.g.*, Dkt. No. 66-1 at 1-2 (claiming an AMS employee took bribes in
 10 exchange for sending mold-remediation work to a company that was not certified to do it); *id.* at
 11 4 (AMS employee told subcontractor he needed a "5 finger discount"); *id.* at 18 ("there was
 12 something wrong in terms of how vendors were being chosen and why certain vendors were kept
 13 on even when they did not do good work or when other vendors would bid less").

14 There are also claims that AMS failed to handle mold properly, but no claim that this
 15 caused damage. *See* Dkt. No. 66-1 at 3 ("residents would call to complain about mold issues,
 16 and no work order would even be entered in the system"); *id.* at 13 (technicians told to paint over
 17 mold); *id.* at 16 (employee instructed to cover up serious mold issues); *id.* at 22 (employee
 18 worried that mold was a health risk to him); *id.* at 30 (technicians were instructed to tell residents
 19 that there was no mold at Fort Irwin because the climate was too dry). And, again, there is
 20 speculation that AMS's practices could cause harm, but no assertion that they did. *See* Dkt. No.
 21 66-2 at 2 (employee refused to "close open work orders because that would hurt the residents").

22 **The Cramer declaration likewise fails to show any claim for property damage.** AMS
 23 points to Mr. Cramer's statements about resident safety. *See* Dkt. No. 59 at 8-9. Scottsdale
 24 explained this declaration's failings in its cross motion for summary judgment. Dkt. No. 53 at
 25 20. Notably, the judge in the underlying case saw it the same way. *See* Bridgman decl.,⁹ Ex. A.

26 ⁹ The Bridgman Declaration in opposition to AMS's motion is filed together with this response.

1 In the underlying litigation, AMS obtained a preliminary injunction prohibiting the
 2 underlying plaintiffs from removing American Management Services California Inc. (“AMSC”)
 3 as manager of the California projects. *Id.* at 1. In denying the underlying plaintiffs’ request to
 4 dissolve the preliminary injunction before trial, Judge Freeman noted that the Cramer declaration
 5 “identifies two specific incidents involving resident safety but indicates that the declarant is ‘not
 6 suggesting that these incidents were the direct result of conduct by Pinnacle,’ only that they
 7 ‘illustrate the significance of responding to work orders’ and the Army’s ability to trust the work
 8 orders.” *Id.* at 21. There was “no evidence before the Court that resident safety at the Monterey
 9 and Irwin projects has been impacted by AMSC.” *Id.* The declaration did *not* even establish that
 10 the two resident-safety incidents “were caused by AMSC’s alleged work order fraud.” *Id.* at 22.
 11 The court thus could *not* “conclude that a risk to resident safety is a likely (as opposed to
 12 speculative) consequence of continuing the injunction against AMSC’s removal” *Id.*

13 **AMS’s motion in limine likewise fails to show that the underlying plaintiffs sought**
 14 **damages based on threats to resident safety.** AMS used Judge Freeman’s preliminary-
 15 injunction ruling as the basis for the motion in limine that it now claims should have put
 16 Scottsdale on notice that property damage was at issue. *See* Dkt. No. 59 at 10. On June 25, 2015
 17 (three days after filing its complaint here), AMS moved to exclude “any reference to the
 18 unfounded proposition that resident lives were ever put in danger as a result of alleged work
 19 order changes or any other conduct by Defendants.” Dkt. No. 65 at 3. AMS argued that the
 20 underlying plaintiffs offered this evidence “to engender emotional sympathy for their claims.”
 21 *Id.* Citing the court’s earlier ruling, AMS asserted that there was no evidence to support the
 22 claims of resident danger and that the claims of such dangers were irrelevant. *Id.*

23 At the outset, AMS fails to explain how, if it believed the underlying litigation sought
 24 damages for the creation of life-safety hazards when it filed its complaint in this action on June
 25 22, 2015, it could have argued on June 25, 2015 that such hazards were irrelevant in the
 26 underlying litigation. Moreover, if the underlying plaintiffs indeed sought such damages, then

1 their response would have been something to the effect of: “this information is relevant because
 2 it is a basis for our damages claim.” But they said nothing of the sort.

3 Instead, they argued that there is “no doubt that closing a work order when the work was
 4 not done has the *potential* to create a serious life safety risk for residents.” Dkt. No. 65 at 8
 5 (emphasis added). It was “important to allow the jury to understand the *potential consequences*
 6 of the fraudulent closing of open work orders as Pinnacle did before the work was completed. . .
 7 . Put another way, when someone engages in a fraudulent scheme, at trial they don’t get to
 8 exclude evidence of the *potential consequences* of their fraud.” *Id.* at 10 (emphasis added).

9 In short, the motion in limine merely confirms: (1) that the underlying plaintiffs did not
 10 seek damages for the hazards that AMS’s fraud allegedly created; and (2) that the underlying
 11 plaintiffs could not identify any instance of such harm and instead claimed only “potential”
 12 harm. Because, as explained above, the mere creation of a risk is not “property damage,” *a*
 13 *fortiori* the *potential* creation of a risk is certainly not “property damage” as a matter of law.

14 **D. AMS fails to show an alleged accidental occurrence.**

15 AMS’s claims fail for the additional and independent reason that the underlying
 16 complaints did not allege a covered “occurrence.” Under the Scottsdale policies, an
 17 “occurrence” is “an *accident*, including continuous or repeated exposure to substantially the
 18 same general harmful conditions.” Dkt. Nos. 50-6 at 34, 50-8 at 35, 50-9 at 34, 50-10 at 37
 19 (emphasis added). On their face, the underlying complaints did not allege any “accidents.”
 20 What they alleged was, in AMS’s own words, “a pattern of misconduct.” Dkt. No. 59 at 6.

21 1. AMS bears the burden of proving that both the alleged conduct and
the alleged result were unintended.

22 AMS attempts to maneuver the unambiguous allegations of intentional wrongdoing into
 23 the accident realm by arguing that, although the underlying complaints alleged intentional
 24 wrongdoing, they do not allege that AMS intended to inflict property damage or bodily injury.
 25

1 Therefore, in AMS's view, the damages should be considered accidental. This argument
 2 contravenes well-established Washington law.

3 In particular, AMS misstates Washington law when it argues that the insurers "must
 4 prove, as a matter of law, that the AMS Insureds intended the resultant property damage and
 5 bodily injury at issue in the Underlying Lawsuits . . ." Dkt. No. 59 at 17. For this proposition,
 6 AMS relies on *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 59–60,
 7 882 P.2d 703 (1994). *Queen City* does not support AMS's arguments, for three reasons.

8 **First, AMS is incorrect when it claims that it is Scottsdale's burden to prove the**
9 intentional nature of AMS's misconduct. The insured bears the burden of proving that a loss
 10 is within the policy's coverage. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 431, 38 P.3d 322
 11 (2002) (citing *McDonald v. State Farm Fire & Cas. Co.*, 119 Wash.2d 724, 731, 837 P.2d 1000
 12 (1992)). Only then does the burden shift to the insurer to show that an exclusion applies. *Id.*
 13 Indeed, *Queen City* placed the burden of proof on the insured. See *Queen City*, 126 Wn.2d at 72.
 14 AMS thus bears the burden of proving that the underlying actions alleged an "occurrence,"
 15 including that its misconduct was an "accident." See, e.g., Dkt. No. 50-6 at 21, 34.

16 **Second, in *Queen City* "occurrence" was defined differently than it is here.** Again,
 17 the Scottsdale policies define "occurrence" as "an accident, including continuous or repeated
 18 exposure to substantially the same general harmful conditions." Dkt. Nos. 50-6 at 34, 50-8 at 35,
 19 50-9 at 34, 50-10 at 37. The definition of "occurrence" at issue in *Queen City*, however, was "an
 20 accident or happening or event or a continuous or repeated exposure to conditions which
 21 *unexpectedly and unintentionally* results in personal injury, property damage." *Queen City*, 126
 22 Wn.2d at 59–60 (emphasis added). Thus, the *Queen City* policies contained a caveat that is not
 23 present in the Scottsdale policies: that the resulting injury be unexpected and unintentional.

24 The distinction is crucial because the portion of *Queen City* on which AMS relies focuses
 25 on the words "unexpectedly and unintentionally." *Id.* at 67–68. The court distinguished this
 26 analysis from cases construing the meaning of the term "accident." *Id.* The court explained that

1 “determination of what constitutes an accident, *i.e.*, whether injury or damage has resulted from
 2 an ‘accident,’ is not dispositive on the standard for expectation of the damages.” *Id.* at 68.

3 In contrast, Washington courts have repeatedly held that the question of whether an event
 4 was an “accident” is an objective inquiry. The Washington Supreme Court has stated in no
 5 uncertain terms that “‘accident’ is not a subjective term. Thus, the perspective of the insured as
 6 opposed to the tortfeasor is not a relevant inquiry. Either an incident is an accident or it is not.”
 7 *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 403, 823 P.2d 499 (1992) (quoting *Roller*
 8 *v. Stonewall Ins. Co.*, 115 Wn.2d 679, 685, 801 P.2d 207 (1990)); *accord. United Servs. Auto.*
 9 *Ass'n v. Speed*, 179 Wn. App. 184, 198, 317 P.3d 532 *review denied*, 180 Wn. 2d 1015, 327 P.3d
 10 55 (2014) (“Whether an event constitutes an accident is determined objectively and does not
 11 depend on the insured’s subjective perspective.”) (citing *Roller*, 115 Wn.2d at 685).

12 **Finally, AMS is mistaken when it argues that showing unintended consequences is
 13 sufficient to establish an accident.** To the contrary, AMS bears the burden of proving *both* that
 14 the result was unintended and that the means were accidental:

15 The rule is now firmly established in this state that, in order to
 16 recover under a policy insuring against death or injury by
 17 accidental means, (1) it is not enough that the *result* was unusual,
 18 unexpected or unforeseen, but it must appear that the *means* were
 19 accidental; and (2) accident is never present when a deliberate act
 20 is performed, unless some additional, unexpected, independent,
 21 and unforeseen happening occurs which produces or brings about
 22 the result of injury or death.

23 *Johnson v. Bus. Men's Assur. Co. of Am.*, 38 Wn.2d 245, 249, 228 P.2d 760 (1951) (citing *Evans*
 24 *v. Metropolitan Life Insurance Co.*, 26 Wn.2d 594, 174 P.2d 961 (1946)).

25 ***It is not necessary that the claimant intend or expect the
 26 injurious consequences of her actions.*** *Unigard [Mut. Ins. Co. v. Spokane Sch. Dist. 81*, 20 Wn. App. 261,] 263, 579 P.2d 1015
 [(1978)] (fire in school garbage can resulting in building blaze);
Safeco Ins. Co. v. Dotts, 38 Wash.App. 382, 385–86, 685 P.2d 632
 (1984) (backhand slap resulting in death). All that is required is
 that the claimant know or should know facts from which a prudent
 person would conclude that the injurious consequences are
 reasonably foreseeable. *Unigard*. ***Otherwise, an insured could
 shift intentionally inflicted injuries to an insurer in violation of***

1 ***public policy.*** *Detweiler[v. J.C. Penney Casualty Ins. Co., 110*
 2 *Wn.2d 99,] 105–06, 751 P.2d 282 [(1988)]; Unigard, at 265, 579*
 3 *P.2d 1015; Dotts, at 386, 685 P.2d 632.*

4 *Lloyd v. First Farwest, 54 Wn. App. 299, 302–03, 773 P.2d 426 (1989) (emphasis added).*

5 Washington courts routinely deny coverage where the insured’s intentional misconduct
 6 had unintended consequences. *See, e.g., Safeco Ins. Co. of America v. Butler, 118 Wn.2d 383,*
 7 *386–87, 823 P.2d 499 (1992)* (no covered accident where insured fired gun at truck, not
 8 intending to hit occupants, but ricochet struck an occupant); *Williams v. Life Ins. Co. of N. Am.,*
 9 *No. C14-0866 RSM, 2015 WL 4604100, at *6* (W.D. Wash. July 30, 2015) (insured’s own death
 not a covered accident where he deliberately rode his motorcycle while intoxicated).

10 There are two types of cases in which Washington courts have recognized that intentional
 11 conduct can be considered an accident for purposes of liability insurance. The first occurs where
 12 the intentional conduct was not intended to be wrongful. The courts have sometimes described
 13 this as the difference between “intentional” and “deliberate” acts. *See Nationwide Mut. Ins. Co.*
 14 *v. Hayles, Inc., 136 Wn. App. 531, 538, 150 P.3d 589 (2007).* A deliberate act is “done with
 15 awareness of the implications or consequences of the act.” *Id.*

16 *Hayles* illustrates this distinction. There, the insured turned on an onion field’s irrigation
 17 system, not realizing that he was overwatering the crops and causing them to rot. *Hayles, 136*
 18 *Wn. App. at 535.* The court held that insurance coverage applied only upon a finding that
 19 reasonable minds “could only conclude that no one under these circumstances would have
 20 anticipated that turning on the water could rot the onions.” *Id. at 539.* The conduct therefore
 21 “although intentional was not deliberate.” *Id. at 539.*

22 The second occurs where the conduct is intended to be wrongful (i.e. “deliberate”), but
 23 “some additional, unexpected, independent, and unforeseen happening occurs which produces or
 24 brings about the result of injury or death.” *Butler, 118 Wn.2d at 401* (quoting *Detweiler, 110*
 25 *Wn.2d at 104*). An example of such a case appears in *State Farm Fire & Cas. Co. v. Ham &*
 26 *Rye, L.L.C., 142 Wn. App. 6, 17, 174 P.3d 1175 (2007).* There, the insured burned some papers

1 in a dumpster and on the sidewalk. *Id.* at 8. She watched the fire burn out and then stomped on
 2 it and patted it with a sweatshirt to extinguish it. *Id.* at 9. After she left the scene, the fire spread
 3 to a nearby building. *Id.* The court held that the claim could be covered if a jury decided that the
 4 damage to the building was not “reasonably foreseeable.” *Id.* at 17.

5 Here, AMS offers no evidence from which a similar result could be reached. The
 6 complaint plainly alleges a fraudulent scheme, not a seemingly innocent act like the watering of
 7 crops in *Hayles*. And this case is nothing like *Ham & Rye*, where the insured committed a
 8 one-time wrongful act and carefully monitored it until she believed she had eliminated any
 9 hazard. Indeed, the allegations here are the opposite: that AMS’s *ongoing* fraudulent conduct
 10 made it impossible to monitor existing hazards. *See* Dkt. No. 51-10 at 2–3, 21.

11 The allegations are that AMS stole scrap metal and falsified work orders so that people
 12 would think repairs had been done when they had not. Undoubtedly, it is reasonably foreseeable
 13 that a person from whom personal property is stolen will be deprived of it. Likewise, it is sheer
 14 common sense that: (a) if repairs to life-safety equipment like fire alarms and carbon-monoxide
 15 detectors are not performed, the property and the residents will be at risk of fire damage or
 16 carbon-monoxide poisoning; and (b) if the person charged with repairing the equipment
 17 fraudulently misrepresents that it has been repaired, the risk will abide. A prudent person would
 18 have concluded that the supposed property damage posited by AMS was a reasonably
 19 foreseeable result of AMS’s intentional misconduct. *See Lloyd*, 54 Wn. App. at 302–03. AMS
 20 thus cannot bear its burden of proving that this misconduct was accidental.

21 2. The underlying plaintiffs alleged only intentional breaches of
fiduciary duty.

22 AMS offers an alternative argument based on the notion that one of the underlying causes
 23 of action, breach of fiduciary duty, can in theory be accomplished negligently. This argument
 24 fails as a matter of law. An automobile collision may occur either negligently or intentionally.
 25 If it is done intentionally, it is not a covered accident. *See, e.g., Roller*, 115 Wn.2d at 685–86,
 26

1 overruled on other grounds by *Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d 689 (2004). The
 2 courts differentiate between negligent and intentional collisions by examining the substance of
 3 the claim. *See id.* (no underinsured motorist coverage where uninsured motorist deliberately
 4 rammed her car into plaintiff); *see also Roberts*, 179 Wn. App. at 765 (no duty to defend, even if
 5 tort could be committed negligently, where plaintiff did not allege accident and alleged that harm
 6 resulted from “fraud, undue influence, and tortious interference”).

7 The underlying plaintiffs’ allegations here do not support AMS’s contention that they
 8 could have resulted in liability for negligent conduct. The MBMH action, for example, alleged
 9 that AMS and its affiliates breached their fiduciary duties in the following intentional ways:

- 10 • “committing wide-spread work order *fraud*”;
- 11 • “instructing their employees and agents to commit *fraud and other*
 intentional misconduct”;
- 12 • “*misappropriating* MBMH’s assets”;
- 13 • *conspiring* to inflate the plaintiffs’ insurance costs;
- 14 • “failing to disclose to MBMH and CMC that they had committed
 fraud and other intentional misconduct”;
- 15 • causing the plaintiffs to overfund the insurance aggregate and then
 keeping the excess funds; and
- 16 • causing AMSC “to engage in *fraud, theft and intentional and*
 knowing misconduct.”

19 Dkt. No. 51-10 at 45–46 (emphasis added).

20 The Fort Benning claims are substantially similar. *See* Dkt. No. 51-5 at 64–68. They
 21 allege the same insurance scheme and assert that AMS committed fraud and self dealing and
 22 covered up its employees’ fraudulent actions, including bribery and kickbacks. *Id.* at 65–67.
 23 Contrary to AMS’s assertion, Scottsdale did not “unilaterally” characterize the underlying
 24 litigation as involving strictly intentional conduct. Dkt. No. 59 at 19. Rather, the underlying
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1 plaintiffs characterized their claims as such, and Scottsdale correctly denied coverage based on
 2 the eight corners of the policies and the complaints. *See Expedia*, 180 Wn.2d at 803.

3 **E. AMS's claims for a defense are barred by policy exclusions.**

4 The lack of any covered claim ends the Court's inquiry and makes it unnecessary to
 5 consider exclusions. In the interest of completeness, however, Scottsdale analyzes here three
 6 exclusions that would preclude any duty to defend, even if the underlying plaintiffs had alleged a
 7 covered claim. Specifically, the exclusions for bacteria or fungi, for expected or intended injury,
 8 and for costs to prevent property damage all would bar coverage.

9 1. Any mold-related claims are excluded.

10 Some of the declarations provided in AMS's extrinsic evidence make vague references to
 11 AMS's practice of not properly remediating mold. Again, none of these declarations identify
 12 any specific instance in which this practice caused any actual damage. However, if
 13 hypothetically the underlying plaintiffs had raised such an allegation, insurance coverage would
 14 be barred by the Fungi or Bacteria Exclusion, which prohibits coverage for:

15 a. "Bodily injury" or "property damage" which would not have
 16 occurred, in whole or in part, but for the actual, alleged or
 17 threatened inhalation of, ingestion of, contact with, exposure to,
 18 existence of, or presence of, any "fungi" or bacteria on or within a
 building or structure, including its contents, regardless of whether
 any other cause, event, material or product contributed
 concurrently or in any sequence to such injury or damage.

19 b. Any loss, costs or expenses arising out of the abating, testing
 20 for, monitoring, cleaning up, removing, containing, treating,
 detoxifying, neutralizing, remediating or disposing of, or in any
 21 way responding to, or assessing the effects of, "fungi" or bacteria,
 by any insured or by any other person or entity.

22 Dkt. Nos. 50-6 at 46; 50-8 at 49; 50-9 at 49; 50-10 at 53. "Fungi" are "any type or form of
 23 fungus, including *mold* or mildew and any mycotoxins, spores, scents or byproducts produced or
 24 released by fungi." *Id.* (emphasis added). As such, AMS cannot claim a defense based on its
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1 employees' failure to remediate mold. *See Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263,
 2 274–76, 109 P.3d 1 (2004) (enforcing mold exclusion).

3 2. The policies bar coverage for expected or intended injury.

4 As Scottsdale explained in its cross motion for summary judgment (Dkt. No. 53 at
 5 21–22), its policies contained an exclusion for damage that is “expected or intended from the
 6 standpoint of the insured.” Dkt. Nos. 50-6 at 22; 50-8 at 23; 50-9 at 22; 50-10 at 25. In its
 7 motion, AMS conflates the analysis of whether there has been a covered “accident” with the
 8 separate analysis of whether damage was “expected or intended.” *See* Dkt. No. 59 at 14–15.

9 The appropriate analysis is outlined in *Rodriguez v. Williams*, 107 Wn.2d 381, 384, 729
 10 P.2d 627 (1986). There, a teenager sued her stepfather for incest and then sued to establish
 11 coverage under his homeowner’s insurance policy. *Id.* at 382. The policy coverage was not
 12 limited to accidental occurrences, but rather covered broadly “damages because of personal
 13 injury.” *Id.* But it excluded damage “which is expected or intended by the insured.” *Id.*

14 The Washington Supreme Court distinguished this from a typical liability policy “in
 15 which coverage for personal injuries only applies to ‘accidental occurrences.’” *Id.* at 384. The
 16 distinction was important because if an “accidental occurrence” policy had been at issue, it
 17 “would simply deny that coverage existed under the policy because the act of committing incest
 18 could not be described as an accidental occurrence.” *Id.* (emphasis added). It was only because
 19 the coverage grant was not limited to accidents that the court found it necessary to analyze the
 20 “expected or intended” exclusion. *Id.* The court concluded that given the obviously harmful
 21 nature of the alleged conduct, intent to injure would be imputed to the insured, and the intended-
 22 injury exclusion therefore applied. *Id.* at 387.

23 Here, the analysis is similar, except that the policies limit coverage to accidental
 24 occurrences. As such, it is not necessary to analyze the exclusion. The Court should “simply
 25 deny that coverage existed under the policy because the act of committing [theft, fraud, and other
 26 intentional misconduct] could not be described as an accidental occurrence.” *Id.* at 384.

1 However, if the Court considers the exclusions, intent to injure—or at least an expectation of
 2 injury—should be imputed to AMS because its intentional misconduct was obviously harmful.

3 3. The owned-property exclusion applies.

4 As Scottsdale explained in its cross motion, the owned-property exclusion would bar
 5 coverage if any claim for property damage had been made in the underlying litigation. *See* Dkt.
 6 No. 53 at 22–24. This exclusion precludes coverage for damage to property “you own, rent, or
 7 occupy.” *Id.* at 22. The underlying plaintiffs either owned or rented the subject property and
 8 qualified as “you” under the policies, both because they were AMS’s affiliates and because AMS
 9 was responsible for procuring insurance for them, thereby triggering the exclusion. *Id.* at 22–24.
 10 Moreover, any coverage for stolen scrap metal would be excluded because it involves personal
 11 property in AMS’s “care, custody or control.” *Id.* at 24.

12 Notably, the policies expressly exclude the type of damage that AMS theorizes could
 13 have been alleged in the underlying litigation. To the extent the underlying plaintiffs could have
 14 claimed costs for remedying hazardous conditions, the policy excludes “any costs or expenses
 15 incurred *by you, or any other person, organization or entity*, for repair, replacement,
 16 enhancement, restoration or maintenance of such property for any reason, including *prevention*
 17 *of injury to a person or damage to another’s property.*” Dkt. Nos. 50-6 at 24; 50-8 at 25; 50-9 at
 18 24; 50-10 at 27 (emphasis added). AMS’s claims thus fail for this reason as well.

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1 **III. CONCLUSION**

2 The underlying litigation did not allege property damage, bodily injury, or an accidental
3 occurrence and thus was not covered under Scottsdale's policies, and was also subject to
4 exclusions. As such, Scottsdale — and not AMS — is entitled to judgment as a matter of law.

5 DATED this 11th day of December, 2015.

6 OGDEN MURPHY WALLACE, P.L.L.C.

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CERTIFICATE OF SERVICE

I certify under the laws of the United States of America that on the 11th day of December, 2015, I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using the CM/ECF System and served counsel below by the method indicated:

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